LIBERTY

# LIBERTY'S BRIEFING ON THE JUDICIAL REVIEW AND COURTS BILL FOR REPORT STAGE IN THE HOUSE OF COMMONS

JANUARY 2022

## ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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# INTRODUCTION

1. Liberty approaches the Judicial Review and Courts Bill with the benefit of 87 years of experience of providing legal advice and supporting landmark cases. Our legal team provides services to claimants involved in judicial review cases as well as bringing public interest challenges in the areas of human rights and equality law. This history means we are well placed to comment on the operation of judicial review as well as the critical role it plays in upholding justice and accountability within the UK's constitutional settlement. It is within this context that we express our concern about the Judicial Review and Courts Bill and the deleterious effects it stands to have upon claimants, Government decision-making, judicial discretion, and the rule of law. This briefing deals only with the first two clauses of the Bill – those dealing with judicial review. For analysis of the courts aspects, see submissions from Public Law Project,[1] JUSTICE[2] and others.

2. The Bill emerges from Committee with its judicial review provisions untouched. It retains its introduction of prospective-only remedies, which will deprive people who have been wronged by the State of proper redress, have a chilling effect on future claimants, and undermine the rule of law. It keeps the presumption in favour of the new remedies, which will fetter judicial discretion in direct contrast to the Government's stated aims for the Bill. It insists on reversing *Cart*, removing a vital safeguard against life-altering decisions being forced upon people due to errors of law, and setting the conditions for more areas to be removed from the scope of judicial review in future.

3. The point of judicial review is to ensure good decision-making by public bodies. It is concerned not with the result in itself, but that the right procedures are followed and the body is operating within the law. Within the separation of powers that forms our political system it is an important check from one branch upon another, acting in the interest of the public. This Bill does nothing to improve the decision-making of public bodies. In many ways it will have the opposite effect. Making challenges harder to bring and remedies less effective may make things easier for Government, but it is at the cost of the general public.

4. The Judicial Review and Courts Bill constitutes just one part of a broader programme of constitutional reform pursued by this Government, with plans to 'overhaul' the Human Rights Act and replace it with a Bill of Rights underway, a consultation on the

[1] Public Law Project, JR and Courts Bill: Briefings and case studies, 14 October 2021, https://publiclawproject.org.uk/resources/jr-and-courts-bill-briefings-and-case-studies/
[2] Justice, Judicial Review and Courts Bill, https://justice.org.uk/judicial-review-and-courts-bill/

Constitutional Reform Act 2005 on the horizon, and a succession of relevant pieces of legislation such as the Elections Bill, the Police, Crime, Sentencing and Courts Bill and the Nationality and Borders Bill currently in front of Parliament. Each of these pieces should be seen as part of a whole: a concerted attempt to shut down potential routes of accountability and exert the power of the executive over Parliament, the courts and the public.

5. Ahead of report stage, a number of amendments have been tabled that seek to minimise the harm that this Bill stands to do: attempting to ensure that the modified orders are used only in the interests of justice (amendment 24) and offer an effective remedy (25), balancing the factors courts would consider when deciding whether to use these remedies so they are less skewed in favour of the defendant (28 and 29) and emphasising that they are purely discretionary (27), preserving collateral challenge (26) and highlighting the importance of judicial review in the UK's constitutional principles (30). Liberty would support these amendments, but the very fact that so many changes are required to mitigate the harm of these provisions, alongside the lack of any need for their introduction, shows that they would be better off discarded altogether. **Liberty would support the judicial review measures being excised from the Bill entirely (amendments 23 and 5). At the very least, we urge parliamentarians to support amendments to remove clause 2 (amendment 5), prospective-only remedies (1, 2 and 3), and any presumption in favour of using suspended quashing orders (4) from the Bill.**

## PROSPECTIVE-ONLY REMEDIES

6. Clause 1 amends the Senior Courts Act 1981 (SCA) to make provision for quashing orders either to not take effect until a specified date, or to come into force without any retrospective effect. In usual practice, a quashing order would come into force immediately and operate as if the decision that had been ruled unlawful had always been null and void. Remedies in judicial review are discretionary and will often result in a declaration that the act was unlawful, with remedial action left to the public body. But when a court does decide to issue a quashing order, it is right that the unlawful decision should stand no longer and those affected should have proper redress.

7. New clause 29A(1)(b) SCA allows for quashing orders to be made including provision "removing or limiting any retrospective effect of the quashing" – in other words, a prospective-only remedy. In Liberty's view prospective-only remedies have the potential to create opportunities for injustice in individual cases, weaken the rule of

law, and introduce unnecessary layers of complexity into an already functioning system. We believe they could have a chilling effect on potential claimants and hinder their access to justice. IRAL made no recommendation for their introduction. **Liberty recommends that parliamentarians support amendments to remove them from the Bill entirely.**

8. The imposition of a prospective-only remedy would result in halting only the future effect of an unlawful decision or secondary legislative provision, with its previous effect being treated as if it had been valid. This creates a situation in which two otherwise identical cases are treated entirely differently depending on whether they were affected before or after a court judgment. Those who were impacted by the unlawful decision before the judgment would have been just as wronged as those impacted after, but would not have recourse to any remedy. This means that an individual claimant bringing a case may help to overturn an unjust decision, but not improve their own situation. An obvious example would be a challenge to the eligibility for welfare benefits – a successful challenge followed by the imposition of a prospective-only remedy could see a claimant acknowledged as having been treated unfairly, but still coming out without the benefit the court recognised they were owed.

9. The Government has been at pains to assert that this situation will not come to pass, and nobody will lose out as a result of the new remedies. At second reading, the chair of the Justice Committee asked for reassurance that "no litigant who has succeeded and has suffered tangible loss is left without an effective remedy".[3] In response, the Lord Chancellor pointed to clauses 1(8)(c) and (d), which state that courts must have regard to the interests and expectations of persons who would benefit from the quashing of the impugned act, or have relied on the impugned act. Clauses 1(8)(c) and (d) are just two of a list of factors to which the court must have regard, also including 1(8)(b), "any detriment to good administration that would result from exercising or failing to exercise the power", and 1(8)(e), "so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act". This profoundly dilutes the protection that 1(8)(c) and (d) may be said to provide by having them weighed up against "detriment to good administration" (which the explanatory notes explain can include "economic or financial instability resulting from the immediate quashing of a

[3] Sir Robert Neill MP, Judicial Review and Courts Bill, House of Commons, Second Reading, 26 October 2021, Col. 192, https://hansard.parliament.uk/commons/2021-10-26/debates/273F4D6A-291D-4A73-8D7B-D6BE51F8448E/JudicialReviewAndCourtsBill

regulation"),[4] and actions that have only been "proposed to be taken" to rectify a public body's unlawful decision – a provision that appears ripe for abuse.

10. All this is concerning for a number of reasons. The arbitrariness and clear prospect for injustice in individual cases undermines the rule of law. What is more, the policy risks breaching the Article 6(1) ECHR right to a fair trial, which requires an effective judicial remedy.[5] It is hard to see how a prospective-only remedy would provide a just outcome to an individual claimant. Looking at the position in other jurisdictions, it is notable that courts are usually only prepared to hand down a prospective ruling in either cases of constitutional importance[6] or cases which would have serious economic repercussions on a large number of good faith relationships.[7] In practice this happens extremely rarely, and these are very limited categories which have been carefully contained on the basis of subtle judicial reasoning and incremental developments. The European Court of Human Rights has also held in a very clear judgment that certain remedies which have prospective-only effect cannot be regarded as effective and therefore would be a violation of Article 13 ECHR.[8]

11. With this in mind, it appears likely that the introduction of prospective-only remedies would have a chilling effect upon future potential claimants. With their use not only allowed but encouraged, this sends a strong signal to an individual who has been wronged by a public body that their actions are not worth challenging, as even if they win their situation may not improve. Even if that prospective claimant does still decide to go ahead, they could find greater barriers in their path to progressing. Applications for legal aid include a requirement to demonstrate a tangible benefit to the claimant were their case to be successful. With prospective-only remedies encouraged, the likelihood of a tangible benefit to a claimant is reduced to such a degree as to call this into question. With no legal aid and little prospect of benefiting even if successful, there is seemingly very little incentive for someone who has been negatively affected by the unlawful action of a public body to bring a case.

12. Even when a case has been brought and a decision found unlawful, the Bill stands to threaten the ability of people to bring collateral challenges. New clause 29A(5) states that when a prospective-only or suspended quashing order has been made, the

[4] Ministry of Justice, Explanatory Notes, Judicial Review and Courts Bill, p23 https://publications.parliament.uk/pa/bills/cbill/58-02/0152/en/210152en.pdf
[5] Běleš and Others v Czech Republic, App No. 47273/99, 12 November 2002, §49.
[6] Canada – Smith, "Canada: The Rise of Judgements with Suspended Effect", Ch.11 in E. Steiner, Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions, p.11.
[7] ECJ - Case C-209/03, §69.
[8] Ramirez Sanchez v. France [GC], 2006 §165-166.

unlawful act "is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect", either retrospectively or until the quashing comes into effect. This situation in which the court pretends an unlawful decision was valid for a period of time would appear to inhibit the ability of a person to rely on its unlawfulness in other proceedings. In other words, a person could be arrested under a regulation ruled unlawful by a court but would not be able to use this in their defence. The IRAL report quotes Professor David Feldman on the "intuitive revulsion" felt against this state of affairs, and concludes, "we readily acknowledge that the law would be in a radically defective state if such collateral challenges to the validity of administrative action were impossible".[9]

13. As well as depriving individual claimants and others who may have been wronged by unlawful decisions of proper redress, prospective-only remedies also have the potential to cause more general harm. Prospective-only remedies weaken the rule of law because they allow the Government and public authorities to act without fear of meaningful repercussions. The Government is effectively encouraged to take risks and act unlawfully, and the only consequence is that the decision will eventually be reversed should it be successfully challenged in future. Good decision-making is the foundation of effective administration, and, as was acknowledged by a significant number of the public bodies which made submissions to IRAL, the potential of being challenged via a claim for judicial review leads to better decision-making.[10] Limiting the consequences for public bodies of making unlawful decisions will only lead to poorer decision-making.

14. Alongside the harm that prospective-only remedies stand to do to individual claimants, anyone affected by unlawful actions, and Government and public authority decision-making, their introduction also stands to have a deleterious effect on the courts. While the previous Lord Chancellor, who introduced this Bill, repeatedly spoke of his "duty to prevent the judiciary being dragged into politics", prospective-only remedies stand to have the opposite effect and force courts to create new law.[11] There is a significant risk that the use of prospective-only rulings could unravel the carefully constructed constitutional balance between the judiciary and Parliament. As Lord Nicholls pointed out in the *Spectrum* case, "the essence of the principled argument against prospective overruling is that in this country prospective overruling is outside the constitutional

[9] IRAL, §3.66.
[10] *Inter alia,* the responses of the Crown Prosecution Service, the Victims Commissioner, North Norfolk District Council and Arun District Council.
[11] Edward Malnick, Robert Buckland: Judges have become more restrained since ruling against prorogation of Parliament, The Telegraph, 17 July 2021, https://www.telegraph.co.uk/politics/2021/07/17/robert-buckland-judges-have-become-restrained-since-ruling-againstprorogation.

limits of the judicial function."[12] It lies outside these constitutional limits because, as Tom Hickman QC has pointed out, prospective-only remedies "would permit courts to exercise a quasi-legislative power including to override primary legislation".[13] In making a quashing order that has only prospective effect, the judge is essentially ruling that the decision had been lawful up until that point, even if it had conflicted with the will of Parliament:

> *"This would allow Judges permanently to cancel the invalidity of unlawful decisions or instruments insofar as they pre-date the court's ruling. Again, it is not proposed that such a power would be limited to procedural or technical defects in the impugned act: it could be used even where the decision, act or instrument is found to be contrary to the express words of a statute."*[14]

15. This would, in effect, confer upon the courts "a power to legislate to change Acts of Parliament and alter private rights".[15] Taken together, the situation that arises from the introduction of prospective-only remedies is one of uncertainty and complexity in its practical application, concern in its constitutional implications, weakening of Government accountability, and great potential injustice for people wronged by the decisions of public bodies.

16. With such a potential for harm to be caused by these orders, one would think that the Government must have a compelling reason for wanting to introduce them. However, between House of Commons second reading and committee stage, the Government has only attempted to advance one example to justify the use of prospective-only remedies. The Minister, James Cartlidge, recounted the 2019 situation in which Natural England revoked general licenses for shotguns in response to a threatened judicial review. It was seven weeks before new licenses could be issued, leaving farmers without legal certainty over how to protect their livestock. Had a prospective-only remedy been available, the Minister suggested, reliance on past licences could have been protected.

17. There are a number of problems with this as an argument in favour of prospective-only remedies. It is worth pointing out first of all that this was only ever a threatened judicial review. This is not an example in which a court was constrained in its remedial options,

[12] [2005] UKHL 41, §28.
[13] Tom Hickman QC, Quashing Orders and the Judicial Review and Courts Act, UK Constitutional Law Association, 26 July 2021, https://ukconstitutionallaw.org/2021/07/26/tom-hickman-qc-quashing-orders-and-the-judicial-review-and-courts-act.
[14] Ibid.
[15] Ibid.

because it never reached a court at all. More importantly, this situation in which it made sense to preserve the legitimacy of these licences for a short period before new ones could be issued seems to lend itself more naturally to a suspended remedy than a prospective-only one. The Minister himself conceded this point, saying "a remedy of suspension could also have been used, because of course it took three months to bring forward the new licences. If the suspension had been for that sort of period of time, we could have avoided detriment".[16] When the only example the Government could muster in favour of introducing prospective-only quashing orders could also have been satisfied by a suspended quashing order, it is clear there is no need for them.

18. Prospective-only remedies will deprive individual claimants of redress, dissuade people who have been let down by public bodies from bringing judicial reviews, undermine the rule of law and good administration, threaten collateral challenge and drag judges into politics, and all for seemingly no reason. **Liberty urges parliamentarians to support amendments to remove them from the Bill.**

## THE PRESUMPTION

19. Along with prospective-only remedies, lause 1 of the Bill also allows for courts to delay the imposition of a quashing order until a specified date – a suspended quashing order.[17] Up until this date were reached, the unlawful decision or policy would be treated as if it were valid. While Liberty is entirely opposed to prospective-only remedies, we believe that there are certain exceptional cases in which neither immediate quashing nor a declaration of unlawful action seems appropriate and it will make sense to suspend the effect of a quashing order.[18] However, we contend that this is already an option open to the courts,[19] and disagree with IRAL that the possibility of making such an order was "ruled out by the UK Supreme Court in *Ahmed v HM Treasury (No 2)".*[20] Indeed, in that case the court readily concluded that it has the discretion to "suspend the effect of any order that it makes".[21] We therefore see the provisions on suspended quashing orders as being unnecessary, along with the actively harmful introduction of

[16] James Cartlidge MP, Judicial Review and Courts Bill, House of Commons, Second Reading, 26 October 2021, Col. 233, https://hansard.parliament.uk/commons/2021-10-26/debates/273F4D6A-291D-4A73-8D7B-D6BE51F8448E/JudicialReviewAndCourtsBill.
[17] New clause 29A(1)(a) SCA.
[18] See for example *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills,* in which the court issued a declaration due to expected logistical difficulties with an immediate quashing.
[19] M. Elliot, 'Judicial review reform I: Nullity, remedies and constitutional gaslighting', Public Law for Everyone (6th April 2021) https://publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting.
[20] IRAL, §3.57.
[21] [2010] UKSC 5, [4] (Ahmed no.2)

those that are prospective-only. The Bill, however, does not just make provision for the use of these remedies; it imposes a presumption in favour of their use. **Liberty urges parliamentarians to support amendments to remove this presumption from the Bill.**

20. New clause 29A(9) SCA states that if it appears to the court that the use of one of the new remedies would "as a matter of substance, offer adequate redress in relation to the relevant defect", the court must make one, "unless it sees good reason not to do so", based on a number of factors. This is not what was recommended by IRAL, who suggested just to "give courts the option" of making a suspended quashing order (as outlined above, the IRAL report did not recommend prospective-only remedies).[22] The imposition of this presumption constitutes a clear fettering of judicial discretion, in contrast to the Ministry of Justice press release accompanying the Bill, which hailed it as handing "additional tools to judges".[23] Imposing a presumption is not handing judges additional tools; rather it has the potential to hinder them from making use of the rest of their toolkit, even when it may be more appropriate to do so.

21. In committee, the Minister rejected this charge, asserting that "the whole basis and premise of the Bill is to trust in the ability of judges to use their discretion to reach judgments that reflect the most appropriate remedy, given all the factors in a specific case at hand. That is the underlying principle".[24] If this is the case, it is difficult to see why the Government included the presumption, which by its very nature is designed to restrain and limit that discretion by outlining situations in which judges must act a certain way. In oral evidence to the Bill Committee, Professors Jason Varuhas and Richard Ekins, both supporters of the Bill's intentions, each characterised the presumption as "weak" and questioned the need and justification for it, suggesting its removal.[25] The presumption is either so strong as to entirely undermine the Ministry of Justice's stated aim of handing judges additional tools, or it is so weak as to be pointless. Either way, it has no purpose being in this Bill.

22. During committee, the Minister made a point of saying: "I remind the Committee that we consulted both on the presumption and on which factors might be relevant in

[22] IRAL, §3.49.
[23] Ministry of Justice, New Bill hands additional tools to judges, 21 July 2021, https://www.gov.uk/government/news/new-bill-hands-additional-tools-to-judges.
[24] James Cartlidge MP, Judicial Review and Courts Bill, House of Commons, Fourth Sitting, 4 November 2021, Col. 112, https://hansard.parliament.uk/Commons/2021-11-04/debates/a064c83b-de8f-4dd9-b287-297789c52600/JudicialReviewAndCourtsBill(FourthSitting).
[25] Professors Jason Varuhas and Richard Ekins, Judicial Review and Courts Bill, House of Commons, First Sitting, 2 November 2021, Col 127, https://hansard.parliament.uk/commons/2021-11-02/debates/93b988d3-1d83-4ef6-86b1-8e9ddd944ae5/JudicialReviewAndCourtsBill(FirstSitting).

applying the new remedies".[26] This is true, and this is how the Government characterised the replies on the presumption in their own consultation response:

> *"A large majority of respondents argued against the use of presumptions in any circumstances, generally citing concerns over fettering judicial discretion or potential injustice to claimants if it was less likely they would receive equitable relief due to a presumption against it. Respondents raised examples where such a presumption would cause injustice."*[27]

23. The imposition of a list of factors to which the court must have regard at new clause 29A(8) likewise serves to hinder flexibility and discretion still further. It should be noted that while IRAL did not suggest a presumption, a list of factors also goes against the panel's report, which said "it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded".[28] It is welcome that the Government consulted on their potential changes to judicial review, and that they should continue to refer to this process, but we would suggest that they pay less attention to the fact of the consultation and more to the result. If the Government is determined to legislate to clarify that courts may suspend the effects of a quashing order, **Liberty is of the strong opinion that there must not be any presumption in favour of their use.**

## CART JUDICIAL REVIEWS

24. Clause 2 of the Bill would amend the Tribunals, Courts and Enforcement Act 2007 to reverse the effect of the Supreme Court decision in *R (Cart & Ors) v The Upper Tribunal*, which would exclude from judicial review Upper Tribunal decisions to refuse permission to appeal decisions of the First-tier Tribunal. What this would do in practice is remove a vital safeguard in cases of the highest importance for very little benefit. **Liberty urges parliamentarians to vote to remove clause 2 from the Judicial Review and Courts Bill.**

25. The Government's main arguments in favour of reversing *Cart* have been that considering the low success rate of this form of judicial review, retaining it constitutes

[26] James Cartlidge MP, Judicial Review and Courts Bill, House of Commons, Fourth Sitting, 4 November 2021, Col. 112, https://hansard.parliament.uk/Commons/2021-11-04/debates/a064c83b-de8f-4dd9-b287-297789c52600/JudicialReviewAndCourtsBill(FourthSitting).
[27] Ministry of Justice, Judicial Review Reform Consultation, The Government Response, July 2021, §94 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004881/jr-reform-government-response.pdf.
[28] IRAL, §3.69.

a "disproportionate use of valuable judicial resource",[29] and that it arbitrarily elevates this one circumstance over other areas of law by providing three "bites of the cherry" rather than the standard two (decision and appeal). The Government and its backbench MPs have become so enamoured of this line of argument that the phrase "three bites of the cherry" and its variants were used a total of 62 times across committee stage. This betrays a misunderstanding of the point, purpose, and wider importance of this sort of judicial review.

26. *Cart* judicial reviews are only given permission to proceed where there is "an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First-tier Tribunal against which permission to appeal was sought are wrong in law" and the claim either "raises an important point of principle or practice" or there is "some other compelling reason to hear it".[30] This is a high bar that recognises two points: first that, far from being a third bite of the cherry, the claimant was never given a proper first bite. A serious error of law was committed in the First-tier Tribunal, and not corrected by the Upper Tribunal, a double unlawful failure in cases of real importance. And second, that *Cart* JRs allow egregious injustices and errors to be caught not just to the benefit of the individual claimant, but the benefit of the system as a whole. They "guard against the risk that errors of law of real significance slip through the system", as Lord Phillips put it in the *Cart* judgment itself.[31]

27. The IRAL panel did recommend reversing *Cart* (unlike introducing prospective-only remedies or a presumption in favour of suspended quashing orders, which were not IRAL recommendations), on the basis of the low success rate making it an unwarranted use of resources.[32] However, the panel's recommendation was formed on statistics that the Government now admits were wrong. IRAL's figure of a success rate of just 0.22% for *Cart* judicial reviews was an incorrect statistic arrived at by counting all cases without data available on the outcome as failures.[33] The Office for Statistics

[29] Ministry of Justice, Judicial Review Reform Consultation: The Government Response, July 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004881/jr-reform-government-response.pdf §36.
[30] Ministry of Justice, Part Four: Judicial Review and Statutory Review, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.7A.
[31] R (Cart & Ors) v The Upper Tribunal [2011] UKSC 28, §92.
[32] IRAL, §3.46.
[33] Joe Tomlinson and Alison Pickup, Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews, UK Constitutional Law Association, 29 March 2021, https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews.

Regulation investigated the statistic,[34] and the Government now suggests that the actual rate of success is 3.4%, or 15 times higher than that on which the recommendation was based.[35]

28. What is more, this new number is based upon a very particular method of defining success in *Cart* judicial reviews: not only the overturning of the refusal of permission to appeal by the Upper Tribunal, but also permission to appeal being granted and the appeal against the First-tier Tribunal's decision being allowed. These subsequent steps go beyond what would be regarded as success in a *Cart* judicial review, and their addition dismisses the important benefit that *Cart* judicial reviews have in correcting errors of law, even if the eventual appeal is not successful. Public Law Project's analysis suggests that the true number of success in *Cart* judicial reviews is more like 5.7%, or over one in 20.[36] Working from the Government's average of around 750 *Cart* JR cases annually, this amounts to more than 40 people a year who would be incorrectly denied their permission to appeal were *Cart* to be reversed.[37]

29. While it is remarkable that the Government is persisting with this policy despite its statistical basis in its own telling being out by a factor of 15 (or if applying a more usual definition of success, by a factor of 25), it is not the number of cases but the nature of them that is most concerning. Most *Cart* judicial reviews relate to immigration and asylum cases. Many of the remainder concern access to benefits for disabled people and others facing destitution. The result of these appeals may decide whether someone may have the means to live and be housed, and whether someone may be deported, separated from their family and face potential mistreatment. The Government is not unaware of this. The Bill's impact assessment states that "the majority of *Cart* cases relate to Immigration and Asylum, therefore those who lose out are more likely to have particular protected characteristics, for example in respect of race and/or religion or belief".[38] This is seen as acceptable, as it will "reduce the number of High Court Judge and Upper Tribunal Judge sitting days required, so saving judicial time and allowing

[34] Public Law Project, Government judicial review numbers are wrong: Stats regulator concurs, 11 June 2021, https://publiclawproject.org.uk/latest/the-governments-judicial-review-numbers-are-wrong-stats-regulator-agrees.
[35] Ministry of Justice, Judicial Review Reform Consultation: The Government Response, July 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004881/jr-reform-government-response.pdf §36.
[36] Public Law Project, Judicial Review and Courts Bill briefing for House of Commons Second Reading, §19, https://publiclawproject.org.uk/content/uploads/2021/10/PLP-Judicial-Review-and-Courts-Bill-2nd-Reading-Briefing-clause-1-and-2.pdf.
[37] Ministry of Justice, Judicial Review and Courts Bill: Impact assessment, 21 July 2021, https://publications.parliament.uk/pa/bills/cbill/58-02/0152/JRImpactAssessmentFinal.pdf §32.
[38] Impact assessment, §34.

Judges to focus on other matters".[39]

30. In their response to the Government consultation, the Immigration Law Practitioners' Association (ILPA) provided an illustration of what the Government intends to jettison to free up time for "other matters". ILPA listed 57 case studies of successful *Cart* JRs omitted from IRAL's report, including that of a Ugandan lesbian whose initial appeal had been sabotaged by a false letter to the court from a homophobic acquaintance,[40] and a victim of trafficking who had originally been deemed to have voluntarily come to work despite having been trafficked into the country as a child.[41] The cases, ILPA wrote, demonstrate how removing *Cart* would have "extremely serious consequences for the people affected":

> *"These are all cases where a person's fundamental rights were engaged, many of them asylum claims, and where the Upper Tribunal made the wrong decision in refusing to grant permission to appeal. These examples demonstrate a significant risk if changes are made to Cart JRs which mean that challenges to unlawful decisions are not permitted to proceed beyond Upper Tribunal stage".*[42]

31. The Government proposes to achieve the reversal of *Cart* through the use of an ouster clause. IRAL was not asked to consider ouster clauses and made no recommendations in relation to them, although the subsequent Government consultation did solicit views on their use. The press release announcing the Bill stated that the Bill "will not address ouster clauses in the way set out in the consultation. Instead, it is expected that the legal text that removes the *Cart* judgment will serve as a framework that can be replicated in other legislation".[43] The Government has also indicated that it intends to "carry out an internal follow-up exercise to identify and review (with a view to potentially updating where necessary) the other ouster clauses currently on the statute book, including the ouster clause in *Privacy International*".[44] As with the manifesto commitment relating to the Human Rights Act, it is concerning to consider what "updating" means in this context, and especially to what other legislation the framework may be applied.

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[39] Impact assessment, §36.
[40] Immigration Law Practitioners' Association, ILPA's response to the government's consultation on Judicial Review Reform, 28 April 2021, case study 17, https://ilpa.org.uk/wp-content/uploads/2021/04/28.04.21-ILPAs-GRAL-response-1.pdf.
[41] ILPA response, case study 48.
[42] ILPA response, p3.
[43] Ministry of Justice, New Bill hands additional tools to judges, 21 July 2021, https://www.gov.uk/government/news/new-bill-hands-additional-tools-to-judges.
[44] MoJ, Judicial Review Reform Consultation: Government Response, §55.

32. At committee stage, Conservative backbenchers Sir John Hayes and Tom Hunt tabled a number of amendments taken from a Policy Exchange Judicial Power Project paper.[45] One of the two deemed to be in scope of the Bill was an attempt to reinstate the ouster clause in section 67 of the Regulation of Investigatory Powers Act 2000, overturning *Privacy International* and excluding judicial review of the Investigatory Powers Tribunal, with a few limited exceptions. While the amendment was not accepted and was withdrawn without being pushed to a vote, the Minister did state that he did "see the merit" in it; "it is more a question of timing".[46] Among the other amendments suggested in the Policy Exchange paper were further ousters relating to prorogation (a response to *Cherry/Miller (No. 2)*[47]*),* tribunal fees *(UNISON*[48]*),* Freedom of Information requests *(Evans*[49]*)*, ombudsman reports *(Bradley* [50]and *Equitable Management Action Group*[51]*),* Acts of devolved legislatures *(AXA*[52]*),* foreign and defence policy *(Palestine Solidarity Campaign*[53]*),* and decisions about inquiries *(Litvinenko*[54]). There is potential here for a considerable proliferation of ouster clauses following the passage of this Bill, and with it a further disintegration of Government accountability. Parliamentarians who are unconcerned about the specific ouster currently on the table should think carefully about the types of decisions that may soon be taken out of the courts' scope using the framework being used to oust *Cart*.

33. This is not the only way that the passage of this Bill may resonate further than what is currently on the page. On 14 December 2021, the Ministry of Justice published a consultation on 'A Modern Bill of Rights' to replace the Human Rights Act (HRA).[55] The Judicial Review and Courts Bill must be seen alongside this consultation. In the most direct way that they overlap, the consultation proposes that the changes to remedies made in clause 1 of this Bill should be extended to all cases where secondary legislation is challenged under the Human Rights Act, so extending the problems outlined in this

[45] Professor Richard Ekins, Policy Exchange, How to Improve the Judicial Review and Courts Bill, 26 October 2021, https://policyexchange.org.uk/publication/how-to-improve-the-judicial-review-and-courts-bill/.
[46] James Cartlidge, Judicial Review and Courts Bill, House of Commons, Eleventh Sitting, 23 November 2021, Col. 414, https://hansard.parliament.uk/commons/2021-11-23/debates/ed02274c-7945-4781-96a7-5cfc5b71dfe5/JudicialReviewAndCourtsBill(EleventhSitting).
[47] R (Miller) v The Prime Minister [2019] UKSC 41.
[48] R (UNISON) v Lord Chancellor [2017] UKSC 51.
[49] R (Evans) v Attorney General [2015] UKSC 21.
[50] R (Bradley) v Secretary of State for Work and Pensions [2008] 3 All ER 1116.
[51] R (Equitable Members Action Group) v HM Treasury [2009] EWHC (Admin) 2495.
[52] AXA General Insurance Ltd v Lord Advocate [2011] UKSC 46.
[53] R (Palestine Solidarity Campaign) v Secretary of State for Communities and Local Government [2020] UKSC 16.
[54] R (Litvinenko) v Secretary of State for the Home Department [2014] EWHC 194.
[55] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998, 14 December 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf.

briefing to an ever wider array of proceedings.[56] Furthermore, the consultation suggests methods by which the Government's desire to facilitate deportations may override the human rights of the people concerned.[57] This, also seen alongside the Nationality and Borders Bill, emphasises again the importance of retaining the vital safeguard of *Cart* judicial reviews, to catch those errors of law that slip through the system.

34. *Cart* JRs constitute a vital last line of defence and this would be true no matter the success rate. Indeed, as a matter of principle, this is a view that the Government has some sympathy with, albeit in a slightly different context. In their response to the Ministry of Justice's follow up consultation, the Government wrote in relation to wider judicial review considerations:

> *"Respondents argued that, at most, there are a handful of court decisions that were arguably incorrect and that, therefore, there isn't a wider problem to address. This reasoning is predicated on the view that a problem is not a problem unless it happens often. The Government is not persuaded by that argument, since even a single case can have wide ramifications."* [58]

35. Liberty suggests that the Government takes its own reasoning to heart. A problem is still a problem when it happens one time in 20, especially when the ramifications can be so catastrophic for the people involved. **Liberty calls upon parliamentarians to vote to remove clause 2 from the Bill entirely.**

## CONCLUSION

36. When the Bill was published, much of the commentary on it centred around its provisions being less extreme than had been feared. While there is truth in this, it is a manufactured situation. The Government commissioned a panel of experts, went vastly beyond their suggestions in its follow-up consultation, had those comprehensively rejected, and has now returned to a point between the two. While closer to IRAL than a Bill based upon the Government's consultation document would have been, it is worth remembering that IRAL did not recommend prospective-only remedies, did not recommend a presumption for suspended quashing orders, did not recommend imposing on the courts a list of factors to determine their use, did not recommend

[56] Ibid, §252.
[57] Ibid, §292-296.
[58] MoJ, Judicial Review Reform Consultation: Government Response, §16.

ouster clauses, and based their recommendation on *Cart* on statistics now shown to be wrong by a multiple of at least 15. We have been left with a Bill that is bad for claimants bringing cases, disincentivises others who have been wronged bringing their own, fetters judicial discretion while dragging courts into matters of policy, and jettisons a vital safeguard for very little gain. There is nothing in this Bill to help improve the quality of decision-making: it just risks making it worse. The judicial review aspects only make up a very small amount of the Judicial Review and Courts Bill and this briefing does not touch on the rest of it, but of the relevant clauses there is very little worth salvaging. **Liberty would support the judicial review measures being excised from the Bill entirely. At the least, we urge MPs to support amendments to remove clause 2, prospective-only remedies, and any presumption in favour of using suspended quashing orders from the Bill.**

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